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No. 4393

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY HEITMAN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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I.

STATEMENT OF THE CASE.

The plaintiff in error was charged by information with one, J. Harris, with violations of the National Prohibition Act. The information contained three counts. The first count charged plaintiff in error and the said J. Harris with having maintained a common nuisance on or about the 4th day of June, 1923, at 950 Hampshire Street, in the City and County of San Francisco, in the Southern Division of the Northern District of California, in that they did then and there, wilfully and unlawfully keep for sale on the premises aforeaid certain intoxicating liquor, to-wit, two 120-gal. stills; four burners; two pressure tanks; tanks; five 500-gal. vats; three hydrometers; three thousand gallons of mash; 100

gallons of what is called jackass brandy; then and there containing one-half of one per cent or more of alcohol by volume, which was then and there fit for use for beverage purposes. That the keeping for sale of the said intoxicating liquor by plaintiff in error and J. Harris was in violation of Section 21 of Title II of the National Prohibition Act.

The second count charged the plaintiff in error and J. Harris on the last mentioned date, at the above mentioned place, with wilfully and unlawfully possessing certain intoxicating liquor, to-wit, two 120-gal. stills; four burners; two pressure tanks; tanks; five 500-gal. vats; three hydrometers; three thousand gallons of mash; 100 gallons of what is called jackass brandy; then and there containing one-half of one per cent or more of alcohol by volume, which was then and there fit for use for beverage purposes. That the possession of said intoxicating liquor by plaintiff in error and J. Harris was prohibited, unlawful and in violation of Section 3 of Title II of the National Prohibition Act.

The third count charged the plaintiff in error and the said J. Harris with having in their possession, on the last mentioned date, at the above mentioned place, certain property designed for the manufacture of intoxicating liquor, to-wit, four burners; two pressure tanks; five 500-gal. vats; three hydrometers; three thousand gallons of mash; 100 gallons of what is called jackass brandy which was then and there intended for use in violating Title II of the

National Prohibition Act in the manufacture of intoxicating liquor containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes. The information alleged that the possession of the said property by the said defendants at the time and place aforesaid was prohibited, unlawful and in violation of Section 3 of the National Prohibition Act. (Trans. Rec. pages 2 to 9.)

The information was filed by the United States Attorney on the 13th day of June, 1923. On the 14th day of June, 1923, plaintiff in error was arraigned and pleaded not guilty to each of the counts set forth in the information and the cause was continued to the 16th day of June, 1923, to be set for trial. (Trans. Rec. page 10.) The defendant, Harris, did not appear at said time and was not apprehended thereafter and will be no longer considered in any of these proceedings.

On the 16th day of April, 1924, plaintiff in error was tried before a jury and on said day the jury returned a verdict finding the plaintiff in error guilty on all of the counts set forth in the information. Said verdict was as follows:

> "We, the jury, find Henry Heitman, the defendant at bar, Guilty on 1st count; Guilty on 2d count; and Guilty on 3d count." (Trans. Rec. page 13.)

On the trial of the cause, plaintiff in error took certain exceptions to the rulings of the Court on

evidence, to the Court's charge, to its refusal to give certain instructions requested by plaintiff in error, to the conduct of the United States Attorney and to the United States Attorney's prejudicial remarks made in his argument to the jury which plaintiff in error asked the Court to instruct the jury to disregard, and which the Court did not so do. The points so raised are set forth with particularity in plaintiff in error's specifications of error relied upon in the next subdivision of this brief.

On the same day, to-wit, the 16th day of April, 1924, plaintiff in error interposed a motion for a new trial; also a motion in arrest of judgment, each of which were by the Court denied. (Trans. Rec. pages 13, 68 and 69.) Whereupon the Court sentenced plaintiff in error to imprisonment for a period of one year in the County Jail, County of San Francisco, State of California, and that he pay a fine in the sum of five hundred and no/100 dollars or in default of payment thereof he be further imprisoned until said fine be paid or he be otherwise discharged by due process of law. (Trans. Rec. page 13.)

A writ of error was thereafter sued out by plaintiff in error to review the judgment and proceedings of the trial Court.

II.

SPECIFICATIONS OF THE ERRORS RELIED UPON.

I.

The Court erred in admitting in evidence over the objection of the defendant, testimony that the defendant had been arrested on another offense prior to the date alleged in the information. That J. Bernhard, a witness for the Government, was asked the following question by the United States Attorney: "Do you know the defendant, Heitman, outside of this occasion?" and the additional question, "Had you arrested him before?" to which question the defendant and plaintiff in error objected specifying his grounds of objection as follows: That the same were incompetent, irrelevant and immaterial and that there was nothing involved which would authorize the United States Attorney to elicit the information sought and that same was prejudicial error on the part of the United States Attorney. To which the witness replied, "I did. Well, no, I was not one of the arresting officers, but I came there afterwards, after he was arrested."

To the Court's order overruling said objection, the defendant then and there duly excepted, and it was stipulated between the Court and counsel that defendant have an objection and exception to that whole line of testimony.

II.

The Court erred in refusing to grant the motion of the defendant and plaintiff in error to strike out

the following testimony, E. A. Powers, a witness for the Government, testified as follows: "For the period of about six or seven weeks, I had been following Mr. Heitman on account of remarks he made around town and it led me into the vicinity of—"

To the Court's order denying said motion, defendant and plaintiff in error duly excepted.

III.

The Court erred in overruling the objection of the defendant and plaintiff in error to questions asked Federal Agent I. H. Cory, a witness for the Government, and the testimony elicited therefrom: Said question was as follows: "Did you ever have occasion to arrest him?" The question was objected to by the defendant and plaintiff in error on the ground that it was incompetent, irrelevant and immaterial. The only question permitted on said subject would be: "Was the defendant ever convicted of a felony?" The witness answered in the affirmative and the objection was by the Court overruled, to which the defendant then and there duly excepted.

IV.

The Court erred in overruling the objection of the defendant and plaintiff in error to questions asked Federal Agent I. H. Cory, a witness for the Government, and the testimony elicited therefrom. Said questions were as follows: "Did you ever meet

the defendant at a place called Valmar?" and "What was he doing at that time and place?" That the defendant raised the same objection as those specified in assignment of error No. 4 and the Court overruled said objections. To which defendant and plaintiff in error then and there duly excepted. The testimony elicited was highly prejudicial to the defendant and was as follows:

> "He was in a barn at the Valmar Canyon, an old barn away up at the head of the canyon. He was there with a man by the name of Lephardt, who I believe also was arrested. They were tacking up building paper; in fact, they had tacked up black paper all around this barn, and were preparing it to operate an illicit distillery. They had a large tub there in the center. Evidently, it was for a worm tap. There was no worm and no still there at the time. Agent Toft and I went into the place. He was there with his partner, Lephardt. They came out and laughed at us and said, 'You fellows are just about a week ahead of time.'"

V.

The Court erred in denying the motion of the defendant and plaintiff in error to strike out the testimony given by Federal Agent I. H. Cory, a witness for the Government, as set forth in specification 5 of this assignment of errors when defendant had ascertained by cross-examination of said witness that the defendant was never convicted nor even arrested for any offense set forth in said fifth specification of error. To the Court's order denying said motion, defendant and plaintiff in error

duly excepted. (Specification of Error No. 5 mentioned above will be Specification No. 4 in this brief.)

VI.

The Court erred in denying the motion of defendant and plaintiff in error for a directed verdict of not guilty made at the conclusion of the Government's case because there was not sufficient evidence to convict the defendant of any of the counts set forth in the information, and upon the further ground that there was a material variance between the information and the proof adduced. The information alleged that a nuisance was maintained at 950 Hampshire Street, San Francisco, and there was proof to show that if an offense was committed it was committed at 590 Hampshire Street, San Francisco.

To the Court's order denying said motion, the defendant and plaintiff in error duly excepted.

VII.

The Court erred in granting the motion of the Government to strike out the following testimony on the ground that it was immaterial. Said testimony was given by Edward A. O'Dea, Esq., attorney for the defendant and plaintiff in error as a witness for the defendant and plaintiff in error. Said testimony was as follows:

> "On Sunday last, with Mr. Heitman, I saw a place at 950 Hampshire Street and if there was such a place it would be between 21st and

22nd Streets, San Francisco. I saw 590 Hampshire Street. It was the paint shop, with the building described by the witnesses and it was on Hampshire Street, between 17th and 18th."

To the Court's order granting said motion, defendant and plaintiff in error duly excepted.

VIII.

The Court erred in overruling the objections of the defendant and plaintiff in error to questions asked the defendant and plaintiff in error on cross-examination by the United States Attorney when he was a witness testifying in his own behalf. The subject matter of said question was a previous arrest at Salada Beach for having a still. Said questions were objected to on the ground that they were incompetent, irrelevant and immaterial, not proper cross-examination, involving questions not at issue in the case; that they constituted prejudicial error on the part of the United States Attorney and that the only question permitted on such a subject would be, "Was the defendant ever convicted of a felony?"

To the Court's orders overruling said objections, plaintiff in error and defendant duly took appropriate exceptions.

IX.

The Court erred in admitting in evidence, over the objection of the defendant and plaintiff in error, the records of the United States District Court in

case No. 12,613 entitled "United States v. Henry Heitman," the United States Attorney calling particular attention to the defendant's plea of guilty in that case. (The record showed that United States District Judge Van Fleet granted a motion excluding evidence to three counts in said information, and denied the motion in one count, to-wit, having property in his possession designed for the unlawful manufacture of liquor. To this count the defendant had pleaded guilty.) The defendant's objection was upon the ground that the evidence was incompetent, irrelevant and immaterial and contained prejudicial matter which had nothing to do with the issues involved in the instant case.

To the Court's order overruling said objection, defendant and plaintiff in error duly excepted.

X.

The United States Attorney was guilty of misconduct which was highly prejudicial to the rights of the defendant when in his argument to the jury at the close of the case he made certain remarks, which remarks were excepted to by the defendant at the time, assigned as misconduct and the Court was requested by the defendant to instruct the jury to disregard said remarks. Said remarks, exceptions, assignment of misconduct, request of the Court and instruction by the Court were as follows:

> "Mr. McDonald. In this case, Gentlemen, we have one of the most flagrant and persistent offenders against the Prohibition Act in this

district. He was first apprehended by Agents Toft and Cory at Miramar—

Mr. O'Dea. For the protection of the defendant's rights, your Honor, if this evidence was admitted for any purpose it was admitted for only one purpose, to show that if he possessed that liquor at this place, or that still, that he possessed it with a guilty knowledge. The District Attorney is not to be permitted to argue the proposition that because this man was arrested once before he is likely to have committed this offense here. I wish to take an exception to the District Attorney's remarks, and assign them as misconduct, and I ask your Honor to instruct the jury and tell the jury that if the evidence is to be considered at all the purpose for which the evidence is, is to be considered.

The Court. That is just what I will do, Mr. O'Dea. I did not understand Mr. McDonald's opening statement or his argument to go any further than that.

Mr. O'Dea. He said, 'We have here one of the most flagrant bootlegger in California,' and that this man was arrested by Agent Cory at such and such a date. That is what I am objecting to.

The Court. What is it you are objecting to, that he is a flagrant bootlegger?

Mr. O'Dea. To that, and to his conclusion that he is flagrant bootlegger from the fact that he was arrested before.

The Court. Of course, the District Attorney has a perfect right to narrate any evidence that has been admitted to the jury. The statement that he is a flagrant bootlegger is for the jury to determine, and not to be taken from the District Attorney. It will be determined from the evidence in this case. You will be instructed hereafter, Gentlemen, as to the purpose for

which evidence of other crimes was admitted. Proceed, Mr. McDonald."

The Court afterwards, on this subject, gave this instruction:

"The Court has admitted evidence that the defendant has pleaded guilty to the possession of a still upon another occasion at Salada Beach. You are to take that evidence into consideration, Gentlemen, only in your determination of the first count or charge of the complaint; that first count charges that the defendant here had in his possession jackass brandy and other things for the purposes of sale, and that in that he maintained a common nuisance. The so-called Volstead Act provides that where a man has in his possession alcoholic liquor for the purpose of sale, that constitutes a nuisance. That evidence was introduced merely as bearing upon the question as to whether or not, if you find that this liquor was in the possession of this defendant, whether he had it there for commercial purposes or for his own use. Under such circumstances, however, the law presumes where a man has liquor in his possession he has it for purposes of sale; that is to say, if you are found with liquor in your possession in any other place than your private house, that constitutes prima facie evidence, that you had it for sale. Therefore, on the first count, if you determine that he did have liquor in his possession, you are likewise to determine whether he had it for sale."

XI.

The United States Attorney was guilty of misconduct which was highly prejudicial to the rights of the defendant when in his argument to the jury

at the close of the case he made certain remarks, which remarks were excepted to by the defendant at the time, assigned as misconduct, and the Court was requested by the defendant to instruct the jury to disregard said remarks. Said remarks, exceptions, assignments of misconduct, request of the Court and instruction by the Court were as follows:

> "Mr. McDonald. Now, Gentlemen, from those two facts and from the testimony you have heard today, from Mr. Powers' statement that he followed him to this place on numerous occasions, saw him there, and that he came in there while the raid was going on, and statements that he made to Mr. Powers at that time, and the statement that he made to Agent Bernhard that he wanted to fix this thing up, I am going to ask you, Gentlemen, what do you think of the case? Do you think there is any question, do you think there is any reasonable doubt that this man was running that still out there on Hampshire Street? It does not make any difference, Gentlemen, whether it was 950 or 590 or what the number was; he was running a still in the Northern District of California, and that is sufficient. You will be so instructed by the Court. And, Gentlemen, when you consider that evidence, you can only find a verdict of guilty on all the counts in the information in this case.
>
> Mr. O'Dea. I didn't wish to interrupt the District Attorney, but now that he is through with his opening argument, I wish to take an ception to the reference, after your Honor had mentioned the matter, to Salada Beach and Miramar as having nothing to do with the issues in this case, and as prejudicial to the rights of this defendant.
>
> The Court. Let the exception be noted.

Mr. O'Dea. And I ask your Honor to instruct the jury to disregard that statement of the District Attorney.

The Court. I will instruct them to the best of my ability what the purpose of that testimony is."

(Thereafter, the Court in its instructions to the jury upon the subject here under discussion gave only the instruction set forth in plaintiff in error's Specifications of Error No. XI.) (Specification of Error No. XI mentioned above will be Specification No. X in this brief.)

XII.

The United States Attorney was guilty of misconduct which was highly prejudicial to the rights of the defendant when in his argument to the jury in reply to counsel for the defendant's argument to the jury he closed same with certain remarks; which remarks were excepted to by the defendant at the time, assigned as misconduct and the Court was requested by the defendant to instruct the jury to disregard said remarks. Said remarks, exceptions, assignment of misconduct, request of the Court and instruction by the Court were as follows:

"Mr. McDonald. I am going to ask you to take into consideration his connection with that former case, his prior record, in connection with a still.

Mr. D'Dea. I object to that and take an exception to it, and ask your Honor to instruct the jury regarding it.

The Court. Yes, I will instruct the jury in reference to it."

(Thereafter the Court in its instruction to the jury upon the subject here under discussion gave only the instruction set forth in plaintiff in error's Assignment of Errors No. XI.) Specification of Error No. XI mentioned above will be Specification No. X in this brief.)

XIII.

The Court erred in giving the following instruction over the objection of the defendant and plaintiff in error to which instruction defendant and plaintiff in error duly excepted:

> "There appears to be a discrepancy here in the number of the street at which this still was found. You are not to consider that at all. The question as to whether or not it was 950 or 590 is of no concern in this case whatsoever, if you find that a still was actually found there."

XIV.

The Court erred in refusing to give the following instruction requested by defendant and plaintiff in error:

If you find from the evidence that liquor was not kept for sale at 950 Hampshire Street, in the City and County of San Francisco, State of California, then you must acquit the defendant of the charge contained in the information of maintaining a common nuisance in violation of Section 21 of Title II of the National Prohibition Act.

To the Court's refusal to give said instruction, plaintiff in error and defendant duly excepted.

III.

ARGUMENT.

I.

IN A PROSECUTION FOR MAINTAINING A COMMON NUISANCE IN VIOLATION OF SECTION 21 OF TITLE II OF THE NATIONAL PROHIBITION ACT PROOF OF THE SPECIFIC PLACE WHERE SAME WAS MAINTAINED IS ESSENTIAL. IF THE EVIDENCE SHOWED THAT SAME WAS MAINTAINED ON A PLACE OTHER THAN THAT SET FORTH IN THE INFORMATION THERE WOULD BE A FATAL VARIANCE BETWEEN THE ACCUSATION AND THE PROOF ADDUCED.

The Court Erred in Its Refusal to Permit the Plaintiff in Error to Produce Proof That the Premises Whereon the Alleged Nuisance Was Maintained Was at a Place Other Than That Set Forth in the Information and by Striking Out Testimony Tending to Prove Variance.

The Court Erred in Denying the Motion of Plaintiff in Error for a Directed Verdict of Not Guilty Particularly as to Count One of the Information Upon the Ground That There Was a Material Variance Between the Information and the Proof Adduced.

The Court Erred in Instructing the Jury That It Was of No Concern Whether the Still Was Found at 950 or 590 Hampshire Street, San Francisco.

The Court Erred in Refusing to Give the Instruction Requested by Plaintiff in Error Upon This Subject.

(Assignments of Errors Nos. VII, VIII, XIV and XV set forth in this brief as Specifications of Errors VI, VII, XIII and XIV.)

These points are raised by the exceptions of plaintiff in error to the Court's refusal to permit a witness to testify as to the location of the place mentioned in the information and by striking out testimony concerning same (Trans. Rec. pages 32 and 33); by the exception of plaintiff in error to the Court's order denying a motion for a directed verdict made upon the ground of a material variance between the facts set forth in the information and the proof adduced (Trans. Rec. page 31); by his exception to the Court's instruction upon the subject (Trans. Rec. pages 59 and 62); and by his exception to the Court's refusal to give his instruction upon same (Trans Rec. page 62).

PLAINTIFF IN ERROR WAS CHARGED IN COUNT ONE OF THE INFORMATION WITH MAINTAINING A COMMON NUISANCE IN VIOLATION OF SECTION 21 OF TITLE II OF THE NATIONAL PROHIBITION ACT AT A PARTICULAR PLACE, TO-WIT, 950 HAMPSHIRE STREET, SAN FRANCISCO.

Section 21 of the National Prohibition Act provides:

> "Any *room, house, building, boat, vehicle, structure,* or *place* where intoxicating liquor is manufactured, sold, kept or bartered in violation of this Title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuis-

> ance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than a thousand dollars or be imprisoned for not more than one year or both.'' (Barnes Fed. Code (Cum. Suppl. 1923), Section 8351t, page 738.)

The unquoted portion of Section 21 creates liens for the payment of fines upon the property found to be a common nuisance. Section 22 of the act provides for the abatement of such a nuisance. Section 23 provides for personal nuisances and Section 24 provides penalties for the violation of injunctions, temporary or permanent, where places have either been declared common nuisances or suits have been instituted to have them so declared.

These four sections create the National law on ''nuisance'' and must be read together.

It should be noted that the sections referred to above, except in case of Section 23, are directed to the ''place'' primarily. They presuppose an inclosure of some kind or at least a situs.

There is only one definition of nuisance in the act. A nuisance must first be proved, then the person maintaining same may be prosecuted, and subjected to the penalties provided by Section 21. He may be enjoined from continuing the said nuisance and the nuisance itself may be abated in accordance with the terms of Section 22 of the act. Thereafter the penalties further provided by Sections 23 and 24 may be invoked. Criminal prosecutions, legal

actions and equitable proceedings must all be predicated on the same kind of nuisance. The act itself draws no distinction between them.

It Is Imperative That the Information, Bill or Complaint Alleging a Nuisance Should Charge the Proper Place.

Plaintiff in error has a legal right to be informed of the nature and the cause of the accusation,

(Sixth Amendment to the United States Constitution);

United States v. Hess, 124 U. S. 483;

United States v. Carrl, 105 U. S. 611;

United States v. Simmons, 96 U. S. 360;

United States v. Cruikshank, 92 U. S. 542;

and when charged by information that he maintained a common nuisance at 950 Hampshire Street, San Francisco, the law presuming him innocent of maintaining said nuisance, it is a violation of the Sixth Amendment to the United States Constitution to compel him to prove upon the day of his trial that he did not maintain a common nuisance at 590 Hampshire Street, San Francisco, California. Especially is this so when the place where the nuisance is maintained is one of the essential ingredients of the offense.

Hattner v. United States, 293 Fed. 381 (C. C. A. 6th Circuit).

In the case last cited, the defendant was charged with maintaining a common nuisance at 2057 North Fourteenth Street in Toledo, Ohio, where intoxicating liquor was kept and manufactured in violation

of Title II of the National Prohibition Act. On the trial, it appearing by the testimony of two witnesses that the nuisance was maintained at 3428 Ursula Boulevard in Toledo, there being no evidence of such maintaining at 2057 North Fourteenth Street, the jury was discharged. On the same day plaintiff in error was again arraigned on an information differing from the earlier one only in that the alleged nuisance was charged to have been maintained at No. 3428 Ursula Boulevard. On the trial, under the second information, a motion for plaintiff in error for a discharge on the ground of former jeopardy was granted as to the first and second counts but denied as to the third. The Court in that case said:

> "We think it clear that plaintiff in error was not twice put in jeopardy upon the charge of maintaining a common nuisance. Under Section 21, Title II, *the specific place of maintaining the nuisance is important and material. The specific 'building' * * * or 'place' where intoxicating liquor was made and kept is declared to be a common nuisance.* The one maintaining this specific nuisance is made subject to prosecution therefor, and guilty knowledge of such use by the owner of the building or place makes the same subject to lien for and liability to be sold to pay the fine and costs against the convicted defendant. It was thus material whether the place of maintaining the nuisance was alleged or proven as at the one location or the other. There is no claim that the two locations were substantially the same. In denying the motion for discharge under the third count the trial judge said that the two

> charges were 'as distinct as any two set of facts with three or four miles separating them, or distinct from each other * * *. A man can not be said to be guilty of committing a nuisance in one place because the evidence tends to show he is guilty of committing precisely the same kind of nuisance in another place,' indeed one might be convicted under separate informations of maintaining a nuisance at one and the same time at each of the two places."

It has been held that a material variance between the evidence and the allegations of the indictment will not sustain a conviction, because based upon the Constitutional guarantee that an accused shall be informed of the nature and the cause of the accusation against him.

Gwilbeau v. United States, 288 Fed. 731 (C. C. A. Fifth Circuit);

Naftzger v. United States, 200 Fed. 494 (C. C. A. Eighth Circuit);

United States v. Riley, 74 Fed. 210 (C. C.).

Aside from the violation of the Constitutional rights of an accused, the rights of third parties may also be involved when the specific description of the property whereon the nuisance is alleged to have been maintained is not accurately set forth in the information for Section 21 of the National Prohibition Act subjects the owner of the place whereon the nuisance is maintained to a lien to pay fines and costs assessed against the person guilty of such nuisance for such violations and any such lien may be enforced in any court having jurisdiction. Fur-

thermore the abatement and injunction provisions of the Prohibition Act may also be invoked to the detriment of innocent property holders, if proceedings invoking the most drastic provisions of the act are carelessly instituted.

In the instant case there was undoubtedly a conflict in the evidence as to the place where the nuisance was maintained, one of the Government witnesses finally stating that the alleged nuisance was maintained at 590 Hampshire Street (Trans. Rec. page 31). The defendant testified that he was arrested by Agent Powers at 18th and Hampshire Streets, at 590 Hampshire Street and that he was not arrested at 950 Hampshire Street (Trans. Rec. page 33). The defendant attempted to introduce evidence that 950 Hampshire Street was between 21st and 22nd Streets in San Francisco. 590 Hampshire Street was the paint shop with the building upstairs described by the witnesses and that it was between 17th and 18th Streets (Trans. Rec. pages 31 and 32). This latter testimony, which was given by counsel for plaintiff in error was ordered stricken out by the Court upon the motion of the United States Attorney, upon the ground that it was immaterial, to which plaintiff in error duly excepted and which we respectfully submit was error.

The Court erred in denying the motion of defendant for a directed verdict of acquittal on the ground that there was a material variance between the information and the proof adduced and we be-

lieve that the Court erred when it instructed the jury as follows:

> "There appears to be a discrepancy here in the number of the street at which this still was found. You are not to consider that at all. The question as to whether or not it was 950 or 590 is of no concern in this case whatsoever, if you find that a still was there" (Trans. Rec. page 62).

The Court erred when it refused to give the following instruction requested by the plaintiff in error at the proper time, to-wit, at the end of the Court's charge:

> "If you find from the evidence that liquor was not kept for sale at 950 Hampshire Street in the City and County of San Francisco, State of California, then you must acquit the defendant of the charge contained in the information of maintaining a common nuisance in violation of Section 21 of Title II of the National Prohibition Act" (Trans. Rec. page 62).

The testimony ordered stricken out showed that there were four city blocks in a populous portion of San Francisco between 590 and 950 Hampshire Street.

950 Hampshire Street is therefore not another description of 590 Hampshire Street.

The plaintiff in error, if the instant conviction be sustained, can again be prosecuted also for maintaining a nuisance at 590 Hampshire Street. He can therefore be placed twice in jeopardy and punished for the same offense though there was no evi-

dence that nuisances were maintained at two different places. If there be such a place as 950 Hampshire Street, that property is subject to the drastic provisions of Sections twenty-one to twenty-four of the National Prohibition Act. The Government or any private law enforcement organization has it within their power to institute abatement proceedings enjoining the occupation of 950 and 590 Hampshire Street for a period of one year.

We respectfully submit that the question herein presented is not a technical one, but presents an issue of much importance to the safeguarding not only of Constitutional rights of one accused of a public offense, but of the quiet and peaceable enjoyment of property.

II.

ADMISSION IN EVIDENCE OF IMMATERIAL TESTIMONY OF A PREVOUS RAID WHERE THERE WAS NO ARREST OF THE DEFENDANT AT VALLEMAR, SAN MATEO COUNTY AND A PREVIOUS PLEA OF GUILTY TO THE POSSESSION OF PROPERTY DESIGNED FOR THE MANUFACTURE OF LIQUOR AT SALADA BEACH, THE HOME OF THE DEFENDANT, PRIOR TO THE CHARGES IN THE INSTANT CASE, CONSTITUTED PREJUDICIAL ERROR.

(Assignments of Errors Numbers II-IV-V-VI, IX and X.)

(Trans. Rec. pages 76, 77, 78, 79, 80 and 81.) Set out in this Brief as Specifications of Errors Numbers I, III, IV, V, VII and IX.

These points are raised by the timely objections made by plaintiff in error at the time of the introduction of the prejudicial matter upon appropriate grounds. The Court was thoroughly apprised of the questionable nature of this subject matter and the menace contained in same to the right of the accused to an impartial trial by an impartial jury.

(Trans. Rec. pages 18 to 22, 27 to 29, 34 to 54.)

Plaintiff in error protected his objections to one type of testimony by a subsequent motion to strike out same (Trans. Rec. page 29) and he moved the Court to instruct the jury to disregard all of the objectionable testimony adduced. (Trans. Rec. pages 19-21 and 37.) The plaintiff in error took exceptions to the rulings of the Court on said objections and motions and did everything possible to properly bring this case to this Court for a review of the lower Court's rulings.

Plaintiff in error was charged by the United States Attorney in a carelessly drawn information, with maintaining a common nuisance in keeping for sale two one hundred and twenty gallon stills, four burners, two pressure tanks, tanks, five five hundred gallon vats, three hydrometers, three thousand gallons of mash, one hundred gallons of what is called jackass brandy, all of which the United States Attorney in the information described as intoxicating liquor, which was in excess of a half of one per cent and which was fit for use for beverage purposes. He was charged with maintaining said

nuisance on the 4th day of June, 1923, at 950 Hampshire Street in the City and County of San Francisco. He was also charged with possessing the same property and with having the same property in his possession which property it was charged was designed for the manufacture of intoxicating liquor. The information charges the last offense as a violation of Section 3 of Title II of the National Prohibition Act, when as a matter of fact same is forbidden by either Sections 18 or 25 of said act.

On the trial little or no evidence was produced to connect plaintiff in error with the charges set forth in the information. There was no evidence showing that the defendant owned any of the property mentioned therein. A witness for the Government, K. H. Koss, who was the manager of the premises where the alleged violations of the law occurred did not rent the place to plaintiff in error but to a man by the name of Harris, whom Koss attempted to describe. (Trans. Rec. page 30.) Koss did not state on the witness stand that plaintiff in error had anything to do with any violations of the law on the premises managed by him, but said that plaintiff in error was a member of the same lodge with him and came to see him frequently at his office, adjoining said premises. Koss testified that he remembered telling Government Agent Powers, "there is one of them now," when plaintiff in error appeared on the scene, at the time Powers said "there is quite a few fellows coming

there. Well, there is quite a few." (Trans. Rec. page 30.) If this could be considered as testimony against plaintiff in error it should be observed that he did not testify to same directly or indirectly on the witness stand and it must be assumed that he would not testify that plaintiff in error ran the still or owned the same or the intoxicating liquor else the District Attorney would have elicited those facts from him in Court. Surely such testimony was available and if it were given it would be supported by his oath, while the statement he made, which caused the arrest of the plaintiff in error was most probably made by him at the time to save himself from arrest, because he undoubtedly was guilty of aiding and abetting in the commission of all the charges of violating the Prohibition Law set forth in the information, *and too the statement made by him was unsworn.* Government witness Powers said that he did not remember that when the remark was made, as above set forth, by Koss, whether the plaintiff in error said anything and afterwards, he admitted on cross-examination that it was possible that he said something. (Trans. Rec. page 27.) In other words, Powers would not deny that at the time the remark was made by Koss that Heitman denied same.

Plaintiff in error was not on or in said premises at the time of the raid. Witness Powers testified "the stills were upstairs, he (Heitman) didn't have any opportunity to go up there. I was not at the time where the stills were and the defend-

ant was not up there. He was not there while I was there at all." (Trans. Rec. page 27.) Two witnesses for the Government testified that plaintiff in error, said when placed under arrest, "Can't we fix it up?" (Trans. Rec. pages 22 and 25.) And that he did not offer any money. (Trans. Rec. page 22.) Agent Powers said he didn't ask me to let him go upon the payment of money or anything of that kind, just to fix it up. I didn't see any money, there was no actual tender of money. (Trans. Rec. page 26.) Plaintiff in error explained this remark made, by the following testimony:

> "Well, when Agent Powers arrested me I didn't know what to say. I didn't know what I was arrested for. I said, 'What are you arresting me for?' and I might have said through the excitement, 'Can't we fix it up' but I didn't mean for bribery or anything like that. I thought I might explain it to him. I never knew there was liquor in the premises to start in with. I didn't go in the upper part of those premises where the still was." (Trans. Rec. page 34.)

Plaintiff in error denied under oath any knowledge of the manufacture of liquor at 590 Hampshire Street or at the place where the property designed for the manufacture of liquor was found. He denied the ownership of any property found on said premises. He denied leasing the premises from any person and said he was in the neighborhood for the purpose of visiting an old friend of his at his office, which was not in the place where the still was found.

THERE WAS NO OTHER EVIDENCE ADDUCED TO CONNECT THE DEFENDANT WITH THE CRIMES SET FORTH IN THE INFORMATION.

It is respectfully submitted that the testimony above referred to was as consistent with the defendant's innocence as with his guilt. The Court should have granted the motion of plaintiff in error for a directed verdict of not guilty made at the conclusion of the Government's case. (Trans. Rec. page 39 and Assignment of Error Number 6 in this brief.) And we submit it was error when the Court did not do so. It is true that the defendant produced evidence, after the denial of his motion in this behalf, but not a single fact was elicited from him or his witness which added additional weight to the Government's case, except the prejudicial matter herein complained of. It is submitted that plaintiff in error believed that when he asked for an instruction upon the question of variance and fortified his position on the prejudicial matters complained of by copious objections, motions and exceptions that it was unnecessary for him to run the risk of an adverse ruling from the Court, which in effect would mean that even with his testimony the evidence was sufficient to convict him, by renewing the motion for a directed verdict. Such a motion made and denied would only have the effect of further prejudicing the defendant in the eyes of the jury. If in the instant case a renewal of this motion were necessary, plaintiff in error requests this Court to invoke Rule

XI of its Rules so as to save plaintiff in error from a possible miscarriage of justice.

If the Court had submitted the facts above set forth alone to the jury there is not much question what the verdict of the jury would have been; for with all the prejudicial matter before them the jury deliberated for over an hour before returning their verdict. (Trans. Rec. page 62.)

It must be conceded therefore that if the Court erred in admitting in evidence extraneous and irrelevant matter, highly prejudicial in its very nature, that the Court's error was directly responsible for the conviction of plaintiff in error.

The objectionable testimony was not admitted to impeach the testimony of plaintiff in error for some of it was allowed to go before the jury before plaintiff in error took the witness stand and was offered in the Government's case in chief. (See the testimony of Government witnesses, Bernhard and Corey.) (Trans. Rec. pages 18, 21, 27, 28 and 29.) And plaintiff in error pointed out to the Court that the only manner in which matters of this kind, in which an accused could be impeached by such a method would be to ask the accused if he had ever been convicted of a felony. (Trans. Rec. page 35.) It could not be used for the purpose of establishing a case against the plaintiff in error or connecting him with a violation of the law. The offenses with which the defendant was charged were not ones requiring proof

of a specific intent. There was no question of guilty knowledge. The law makes possession of liquor illegal. So does the law make the possession of property designed for the manufacture of intoxicating liquor illegal in itself. And the defendant was not found in the possession of either. The maintenance of a nuisance under Section 21 of the Prohibition Law implies a continuity of action at a particular place for a substantial period, and if, which is not so in the instant case, the defendant was actually convicted of maintaining a common nuisance at Vallemar, or at Salada Beach, San Mateo County, fifteen miles distant from the nuisance which is alleged to have been maintained, outside of which defendant was arrested in this case, it is respectfully asked in what possible manner such convictions for nuisance would show that the defendant was guilty of maintaining a nuisance in the present case?

It should be noted here that unlike the offenses of illegally possessing intoxicating liquor, selling or manufacturing same, the law does not inflict any greater punishment for second or subsequent convictions for maintaining a common nuisance.

The Court said that such testimony was brought before the jury's attention for the purpose of proving the charge of nuisance. Let us quote the language of the Court:

> *"Mr. O'Dea, I have passed upon that day after day and day after day. I have uniformly held and I am satisfied I am right, that where*

there is a charge of nuisance, evidence of Other Similar Offenses *is admissible."*
(Trans. Rec. page 19.)

The Defendant was Never Before Convicted of Maintaining a Common Nuisance Under Section 21, Title II of the National Prohibition Act or Under any Other Law.

In the first objectionable case produced before the jury as testified to by Government witness, I. H. Cory (Trans. Rec. pages 27 to 29), the plaintiff in error was not even arrested. The defendant was seen in a barn in Vallemar Canyon on the coast of Central San Mateo County with another man who was tacking up black paper around the barn. They had a large tub there in the center which the agents said was evidently for a worm tap. But there was no worm there or any still there. A bantering jest, upon the visit of the Prohibition officer was made to him by plaintiff in error. This is all the evidence revealed. This was not proof of maintaining a common nuisance or of any other crime and its only possible purpose was prejudicial.

In the case in which the record was produced, preluded as it was, by the ominous references to it by the United States Attorney, the fact was revealed that the defendant pleaded guilty to the charge of having in his possession certain property designed for the manufacture of liquor on the 27th day of November, 1922, at Salada Beach, in the County of San Mateo, State of California. And That the

Court Ordered All Other Counts Dismissed. In that case the defendant was not charged with having maintained a common nuisance in violation of Section 21 of Title II of the National Prohibition Law. (Trans. Rec. pages 40 and 54.)

In this record, there is included the motion of the defendant to return property in the case of his arrest at Salada Beach. Here there was such an aggravated case of violation of his constitutional rights that the late Judge William C. Van Fleet ordered the counts charging illegal manufacture, and possession dismissed and accepted the plea of guilty he did, because the property mentioned was not found in the defendant's dwelling house which the Prohibition agents so flagrantly violated. In that case the motion was based upon substantial grounds. The attention of the Court is called particularly to the following:

> "On the same date after the hour of 11 o'clock P. M., long after the sun had set, the above mentioned Federal Prohibition Enforcement Officers surrounded the dwelling house of your petitioner, certain of them going to the front door and others remaining in the rear of said dwelling house; that thereupon certain of said officers pounded on the front door of the petitioner's home, waking your petitioner and Poet, who were in bed and undressed; one of the number called out of the blackness of the night, 'open the door we are Federal Officers.' Your petitioner who was uncertain whether they were criminal marauders or really in fact Federal Prohibition Enforcement Officers, asked if they had a search warrant, to which

> they made reply, that they did not need any, and said 'if you don't open the door we are going to break in,' to which your petitioner replied, 'wait till I get dressed,' and that thereupon one of their number, whom your petitioner has since been advised, was not even a Federal Prohibition Enforcement Officer, but acting under their supervision, illegally and unlawfully opened one of the rear windows and climbed into the petitioner's dwelling house and he illegally and unlawfully went into said premises, opened the front door and allowed the Prohibition Enforcement Officers to enter; that at said time none of said Federal Prohibition Officers had any search warrant to search the petitioner's home; they had no warrant for his arrest or the arrest of any occupant of said home; they had made no previous purchases of liquor from said premises, no crime was being committed in their presence and your petitioner and his friend were asleep and oblivious to Prohibition Officers' previous acts." (Trans. Rec. pages 49 and 50.)

The "previous acts" referred to took place in the seizure from the barn connected with the dwelling house, which was made a few minutes before. The learned Judge differentiated between the barn and the home, which was the reason for the defendant's plea as set forth in this record.

The record of the previous case occupying so much space in this record was not even read to the jury. The jury believed that the defendant was convicted of manufacturing liquor in violation of the law and of maintaining a common nuisance at the place charged in that information and none of

the facts or harrowing circumstances attendant upon the search and seizure were read. *The record was put in as proof absolute that the defendant was a very bad man and a flagrant violator of the Prohibition Law, to which the United States Attorney made frequent reference in his closing argument to the jury.*

It is proper here to remind this Court of the language used by it in the case of *Allen v. United States,* 115 Fed. 3, on page 12, and cited very recently in the case of *Manning v. United States,* 287 Fed. 800; (C. C. A. 8th Circuit).

In the Allen case, this Court said:

> "All men stand equal before the law, and have the same constitutional rights and privileges. The high and the low, the poor and the rich, the criminal and the law abiding, when indicted and accused of crime, are entitled under the law, to a fair and impartial trial. This is a sacred boon guaranteed to every person, and of which no one should ever be deprived. The law in its extended reach, power and influence, is as tender of the rights of the man who is supposed to be bad as it is of the liberties and rights of the man who is supposed to be good. The trial of every man should be free from undue prejudice or odium, especially upon the part of all officers clothed with power and charged with the duty of administering the law in such a manner as to reach the ends of justice and right."

The record of a prior judgment and a plea of guilty of having in one's possession property designed for the unlawful manufacture of liquor to

substantiate a charge of nuisance is in effect condemned by this Court in the case of *Hazleton v. United States,* 293 Fed. 384. Here this Court said:

> "Doubtless a record of a prior judgment and a plea of guilty of having kept in June, 1922, a place where intoxicating liquor was sold would have been admissible against the defendant upon the ground that such an offense was connected with the charge under investigation, as part of the continuing offense; but it was very prejudicial to allow the prosecution, as part of its case in chief, to introduce evidence of a plea of guilty of an apparently collateral offense. The evidence was not admissible as affording a legal inference of guilt of the crime for which defendant was being tried, and clearly its effect must have been to impress the minds of the jurors that the defendant was a woman of bad tendencies and unworthy."
>
> "For the reason, therefore, that reception of the evidence conflicted with the firmly rooted rule that the prosecution may not initially assail defendant's character, the judgment must be reversed and the cause remanded with directions to grant a new trial."

EVIDENCE OF PREVIOUS OFFENSES COLLATERAL TO THE ISSUE TO BE TRIED AND NOT BEARING DIRECTLY AND UNEQUIVOCALLY ON ANY ISSUE BEFORE THE COURT, EXCEPT TO SHOW THAT THE DEFENDANT WAS A MAN WHO WAS ARRESTED BEFORE OR WHO PLEADED GUILTY TO A MISDEMEANOR NOT GERMANE TO PRESENT CHARGE, IS PREJUDICIAL, AND PERMITTING THE INTRODUCTION OF SAME BEFORE THE JURY OVER THE OBJECTION OF DEFENDANT CONSTITUTES PREJUDICIAL ERROR.

It was so held in the following authorities:

Hall v. United States, 150 U. S. 76;

Boyd v. United States, 142 U. S. 454;

Jianole v. United States, 299 Fed. 496; C. C. A. 8th Circuit;

Sischo v. United States, 296 Fed. 696; C. C. A. 9th Circuit;

Gart v. United States, 294 Fed. 66; C. C. A. 8th Circuit;

Hazelton v. United States, 293 Fed. 384; C. C. A. 9th Circuit;

Cohen v. United States, 291 Fed. 368; C. C. A. 7th Circuit;

Hatchet v. United States, 293 Fed. 1010;

Newman v. United States, 289 Fed. 712; C. C. A. 4th Circuit;

Manning v. United States, 287 Fed. 800; C. C. A. 8th Circuit;

Beyer v. United States, 284 Fed. 225; C. C. A. 3rd Circuit;

McDonald v. United States, 264 Fed. 733; C. C. A. 1st Circuit;

Harris v. United States, 260 Fed. 531; C. C. A. 8th Circuit;

Paris v. United States, 260 Fed. 529; C. C. A. 8th Circuit;

Fish v. United States, 215 Fed. 544; C. C. A. 1st Circuit;

United States v. Lundquist, 285 Fed. 447;

People v. Johnson, 63 Cal. App. 178.

In the case of *Boyd v. United States,* 142 U. S. 454, at page 458, Supreme Court Justice Harlan said:

> "But we are constrained to hold that the evidence as to the Brinson, Mode and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and that the injury done the defendants, in that regard, was not cured by anything contained in the charge. Whether Stanley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried." * * * "Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death."

In the case of *Jianole v. United States,* 299 Fed. 496, the circumstances were much the same as in the instant case. Here the Court said on page 499 of the Reporter:

> "The Court allowed the defendant, over objection to be questioned in regard to former pleas of guilty to a charge of unlawful manufacture of liquor. It is a general rule of criminal law that the conviction of the defendant of a crime not set forth in the information or indictment is not competent evidence on the trial of the particular charge before the Court. It is true there are exceptions to this rule, for instance, where the criminal intent of the de-

> fendant must be proved as an ingredient of the crime charged, proof of his commission of other like offenses at about the same time may be admissible on that question. So we confine our ruling to the particular facts of the instant case, as it is not within any of the exceptions. The testimony referred to showed that Jianole had pleaded guilty to a misdemeanor a year and a half before the date of the alleged felony. There was no connection between the two, either in respect to point of time or similar offense. See Boyd v. United States, 142 U. S. 450, 12 Sup. Ct. 292; 35 L. Ed. 1077; Paris v. United States (8th C. C. A.), 260 Fed. 529, 171 C. C. A. 313; Wolf v. United States (C. C. A.), 290 Fed. 738; De Witt v. United States (C. C. A.), 291 Fed. 995."

So in the case of *Beyer v. United States,* 282 Fed. 225 (C. C. A. 3rd Circuit).

The Court said on page 227:

> "While proof of the possession of liquor at another time was collateral and immaterial so far as establishing the issue on trial is concerned, its effect upon the jury was detrimental and prejudicial to the defendant. Evidence that he committed other crimes at other times may not be admitted to show that he had it within his power and was likely to commit the particular crime with which he was charged."

Lastly, it would be well to call the attention of this Court to the attitude of the California State Courts upon this particular question as revealed in the case of *The People v. Henry Johnson,* 63 Cal. App. 178. Note the language of the Court so applicable to the case under discussion; it is to be found on page 183 and is as follows:

"While, ordinarily, the determination of a sharp conflict in the evidence addressed to the proof and disproof of a disputed issue of fact is a matter entirely within the province of the jury, or the Court, if the questions of fact are submitted to its decision, still the very fact that there is here such a positive evidentiary conflict compels the conclusion that the allowance of so large an amount of hearsay testimony as in proof of the defendant's guilt had the effect of denying to him that fair and impartial trial to which every person on trial for his life or his liberty in our Country is entitled as a matter of absolute right. Nor, even upon its face is the competent evidence of guilt in this case so overwhelming in probative weight or force so as to warrant the conclusion that a miscarriage of justice would not result from the verdict, if it is permitted to stand. It may be conceded that Section 4½ of Article VI of the Constitution is a mantle within the dark recesses of whose ample folds a multitude of errors occurring in the trial of a case may rest secure against judicial inspection, but we can not persuade ourselves that it was ever intended as authority supporting or sanctioning the denial to a defendant in a criminal or a litigant in a civil case a fair and impartial trial according to the law of the land."

"Not alone upon the foregoing consideration do we conclude that the defendant was not accorded the character of trial which the laws guarantee to him, but our view also is that the testimony of sales made in said saloon prior to the time at which the defendant purchased the place and himself took responsible control and management of the establishment was wholly irrelevant to the issue in his case, and that its effect was to prejudice him in the minds of the jury. Such testimony might be pertinent to

> and admissible in a civil case to abate the nuisance, but certainly it is wholly foreign to this case, which, it must be kept in mind involves a crime of criminal conduct on the part of the accused."

It would seem therefore that the Courts of this Country both National and State are at one in their condemnation of the admission in evidence of collateral and irrelevant matters, prejudicial in their very nature, such as those under discussion in the instant case.

III.

MISCONDUCT ON THE PART OF THE UNITED STATES ATTORNEY IN HIS ARGUMENT TO THE JURY WHEREIN HE ARGUED THAT THE DEFENDANT WAS GUILTY IN THE INSTANT CASE ON ACCOUNT OF HIS PREVIOUS HISTORY; AND ERROR ON THE COURT'S PART IN ITS TACIT REFUSAL TO INSTRUCT THE JURY TO DISREGARD SAME.

(Assignments of Errors XI-XII and XIII; Specifications of Errors X-XI and XII in this brief.)

These points were properly raised by plaintiff in error; on three different occasions he excepted to them and assigned them as misconduct; and asked the Court to instruct the jury against them, which the Court promised to do at a later time. (Trans. Rec. pages 55, 56, 57.) We submit that the Court should have warned the jury to disregard the remarks at the time his attention was called to them.

It will be noted that during the trial also the Court stated that it would instruct the jury how they should regard testimony concerning the occurrences at Vallemar and the defendant's plea of guilty to the possession of property designed for the manufacture of liquor at Salada Beach. We submit the Court's instructions in this behalf in reply to the many requests of plaintiff in error for the Court to instruct the jury to disregard the said matters and the use to which the District Attorney put said incidents.

Here is the only instruction given by the Court on the subject at all: the Vallemar incident was omitted entirely:

> "The Court has admitted evidence that the defendant has pleaded guilty to the possession of a still upon another occasion at Salada Beach. You are to take that evidence into consideration, gentlemen, only in your determination of the first count or charge in the complaint; that first count charges that the defendant here had in his possession jackass brandy and other things for the purposes of sale, and that in that he maintained a common nuisance. The so-called Volstead Act provides that where a man has in his possession alcoholic liquor for the purpose of sale that constitutes a nuisance. That evidence has been introduced merely as bearing upon the question as to whether or not, if you find that this liquor was in the possession of this defendant, whether he had it there for a commercial purpose or for his own use. Under such circumstances, however, the law presumes that where a man has liquor in his possession that he has it for purposes of sale; that is to say, if you are found

with liquor in your possession in any other place than your private house, that constitutes prima facie evidence that you had it for sale. Therefore on the first count if you determine, that he did have liquor in his possession you are likewise to determine whether he had it for sale."

(Trans. Rec. page 59.)

This is the answer plaintiff in error received to his many demands that he be tried only on the evidence pertaining to his arrest on the date set forth in the information. And to his requests that the District Attorney not try him as a bad man or as a flagrant bootlegger, but as a fellow human being on trial for his liberty. It is submitted that all the defendant asked was an ordinary trial. He did not ask the Court for any favor or something that he was not entitled to but just a fair opportunity to tell his story and have an American jury pass upon it with the Government's material testimony. Trials are essentially for the accused. In uncivilized lands there are no trials. Capture and arrest constitute due process of law.

Here are the remarks of the United States Attorney and the proceedings had in relation to same:

"Mr. McDonald. In this case, gentlemen, we have one of the most flagrant and persistent offenders against the Prohibition Act in this District. He was first apprehended by agents Toft and Cory at Miramar (a palpable misstatement of the evidence).

Mr. O'Dea. For the protection of the defendant's rights, your Honor, if this evidence was admitted for any purpose it was admitted

for only one purpose, to show that if he possessed that liquor at this place, or that still, that he possessed it with a guilty knowledge. The District Attorney is not to be permitted to argue the proposition that because this man was arrested once before he is likely to have committed this offense here. I wish to take an exception to the District Attorney's remarks and assign them as misconduct and I ask your Honor to instruct the jury that if the evidence is to be considered at all the purpose for which it is, is to be considered.

The COURT. That is just what I will do, Mr. O'Dea. I did not understand Mr. McDonald's opening statement or his argument to go any further than that.

Mr. O'DEA. He said, we have here one of the most flagrant bootleggers in California and that this man was arrested by agent Cory at such and such a date. That is what I am objecting to."

We submit that the following question asked by the Court did not redound to the advantage of plaintiff in error.

"The COURT. What is it you are objecting to, that he is a flagrant bootlegger?

Mr. O'DEA. To that and to his conclusion that he is a flagrant bootlegger from the fact that he was arrested before.

The COURT. Of course, the District Attorney has a perfect right to narrate any evidence that has been admitted to the jury. The statement that he is a flagrant bootlegger is for the jury to determine and not to be taken from the District Attorney. It will be determined from the evidence in this case. You will be instructed hereafter, gentlemen, as to the purpose for which evidence of other crimes was admitted. Proceed, Mr. McDonald."

It is well to observe here that the defendant was not on trial for being a flagrant bootlegger nor was he charged with any species of National vagrancy. This is how Mr. McDonald proceeded:

"Mr. McDonald. *Now, gentlemen, from those two facts and from the testimony you have heard today,* from Mr. Power's statement that he followed him to this place on numerous occasions (see how this compares with the testimony. Trans. Rec. pages 23 and 24), saw him there, and that he came in there while the raid was going on and statements that he made to Mr. Powers at the time (what were they?) and the statement that he made to agent Bernhard 'that he wanted to fix things up,' I am going to ask you, gentlemen, what do you think of the case? Do you think there is any reasonable doubt that this man was running that still out there on Hampshire Street? It does not make any difference, gentlemen, whether it was 950 or 590, or what the number was, he was running a still in the Northern District of California, and that is sufficient. You will be so instructed by the Court.

Mr. O'Dea. I didn't wish to interrupt the District Attorney, but now that he is through with his opening argument, I wish to take an exception to the reference, after your Honor had mentioned the matter, to Salada Beach and Miramar as having nothing to do with the issues in this case and as prejudicial to the rights of this defendant.

The Court. Let the exception be noted.

Mr. O'Dea. And I ask your Honor to instruct the jury to disregard that statement of the District Attorney.

The Court. I will instruct them to the best of my ability what the purpose of that testimony is."

And in the closing argument of the United States Attorney, these proceedings were had:

> "Mr. McDonald. I am going to ask you to take into consideration his connection with that former case. His prior record in connection with the still.
>
> Mr. O'Dea. I object to that and take an exception to it, and ask your Honor to instruct the jury regarding it.
>
> The Court. Yes, I will instruct the jury in reference to it." (Trans. Rec. pages 55 to 57.)

If the Court permitted this testimony to be admitted in evidence for the purpose of showing that the defendant maintained a nuisance continuously on the premises herein described, it was not proper for the United States to argue that from those facts the defendant was a bad man, one of the worst bootleggers in the State of California and very likely from those facts to have committed the crime charged in the information in the instant case.

Further argument of citation is unnecessary to establish this last point.

When Plaintiff in Error Asked the Court to Instruct the Jury to Disregard Prejudicial Testimony and Remarks of the United States Attorney and the Court in Effect Said It Would Do So and It Did Not, His Exceptions Are Not Lost By His Failure to Again Request the Court to So Instruct the Jury When He Found the Court Had Not Done So.

(See *Boyd v. United States,* 142 U. S. 451; *Sischo v. United States,* 296 Fed. 696).

The subject under discussion in a degree was covered by plaintiff in error in the last subdivision of this brief. It would be well, however, to call the Court's attention to these cases:

Williams v. United States, 168 U. S. 382;
Graves v. United States, 150 U. S. 118;
Hall v. United States, 150 U. S. 76;
Wilson v. United States, 149 U. S. 60;
Sischo v. United States, 296 Fed. 696 (C. C. A. 9th Circuit);
Wright v. United States, 288 Fed. 428;
Skuy v. United States, 261 Fed. 316;
McKnight vs. United States, 97 Fed. 208.

United States Supreme Court Justice Harlan in deciding the case of *Williams v. United States,* 168 U. S. 382, in discussing questions similar to those in the instant case, said:

> "Another assignment of error deserves to be noticed. One of the witnesses for the defense was the collector of customs for the port of San Francisco. He was asked to whom, upon his return from Washington, was assigned the in-investigation of female cases. The court having inquired as to the purpose of this testimony, the attorney for the accused said: 'It has been sworn to by Mr. Tobin that Mr. Williams asked for certain cases to be assigned to him and show the result. We propose to show by Mr. Wise that on his return from Washington he assigned to Williams the investigation of Chinese female cases, and while Mr. Williams was acting in that behalf there were more females sent back to China than ever went back before or after.' The representative of

> the Government objected to this evidence as irrelevant, saying in open court, and presumably in the hearing of the jury, 'No doubt, every Chinese woman who did not pay Williams was sent back.' The attorney for the accused objected to the prosecutor making any such statement before the jury. The court overruled the objection, and the defendant excepted. The objection should have been sustained. The observation made by the prosecuting attorney was, under the circumstances, highly improper, and not having been withdrawn, and the objection to it being overruled by the court, it tended to prejudice the rights of the accused to a fair and impartial trial for the particular offenses charged."

The United States Supreme Court, in reviewing prejudicial remarks made by a United States Attorney in his closing argument to the jury, and the Court's refusal to instruct the jury to disregard same when called upon to do so, said, in the case of *Hall v. United States,* cited supra:

> "But the district attorney did not content himself with alluding to the supposed fact by way of illustration. He relied upon it, and upon his inference therefrom that the defendant's hands were stained with the blood of negro, and other like expressions and declarations of his own, to establish that 'the killing of a negro in Mississippi, for which the defendant had been tried and acquitted there, was murder.' This whole branch of his argument was evidently calculated and intended to persuade the jury that the defendant had murdered one man in Mississippi, and should therefore be convicted of murdering another man in Arkansas.

The attempt of the prosecuting officer of the United States to induce the jury to assume, without any evidence thereof, the defendant's guilt of a crime of which he had been judicially acquitted, as a ground for convicting him of a distinct and independent crime for which he was being tried, was a breach of professional and official duty, which, upon the defendant's protest, should have been rebuked by the court and the jury directed to allow it no weight.

The presiding judge, by declining to interpose, notwithstanding the defendant's protest against this course of argument, gave the jury to understand that they might properly and lawfully be influenced by it; and thereby committed a grave error, manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of exception, and, having been duly excepted to, entitles him to a new trial. Wilson v. United States, 149 U. S. 60, 67, 68 (37: 650, 652)."

CONCLUSION.

It is respectfully submitted that for the substantial and not technical reasons stated in this brief, to-wit: (1) A variance between the facts set forth in the information and the proof upon a material matter; (2) The admission in evidence of immaterial, irrelevant and collateral matters prejudicial in their very nature, which deprived plaintiff in error of his right to a fair trial by an impartial jury; (3) Misconduct on the part of the United States Attorney permitted by the Court in the face of strenuous objections of plaintiff in error.

That the judgment of the lower Court should be reversed.

Dated, San Francisco,
March 13, 1925.

EDWARD A. O'DEA,
Attorney for Plaintiff in Error.